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Democrats lose at their own game

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Body

American Democrats and progressives are lighting their hair on fire over President Donald Trump's nomination of GOP stalwart Brett Kavanaugh to the U.S. Supreme Court. And they should be. There's nothing worse than being beaten at your own game and by your own rules.

Under long-standing Senate rules, a minority of 41 (out of 100) senators could "filibuster" - ie. block - presidential nominations to all federal courts, including the Supreme Court. The filibuster rule allowed a determined minority to talk a nomination to death. They could prevent a judicial nomination from ever coming to a vote by continuing to speak - since Senate rules required 60 votes to cut off debate.

In 2013, this all changed.

Frustrated by Republican senators using filibuster to block president Barack Obama's judicial nominees, the Democratic majority abolished the filibuster rule except for nominees to the Supreme Court. Going forward, a simple majority vote could cut off debate. At the time, there were 17 Obama judicial nominees awaiting confirmation votes, all of whom were subsequently approved by the Democratic majority.

Then-Senate Minority Leader Mitch McConnell warned the Democrats: "I say to my friends on the other side of the aisle, you'll regret this. ... And you may regret it a lot sooner than you think."

Fast-forward to April, 2017.

Donald Trump is now president, and the Democrats are desperately filibustering his nominee to the Supreme Court, Neil Gorsuch. Sen. Mitch McConnell, now Majority Leader, declares that what's sauce for the goose is sauce for the gander, and uses his majority to extend the repeal of the filibuster rule to Supreme Court nominees. Debate is cut off, and Gorsuch is approved by a vote of 54-45.

Now with the retirement of Justice Anthony Kennedy, Trump has an opportunity for a second Supreme Court appointment. With the 2017 rule change, Senate Democrats have no opportunity to filibuster a final vote, which Trump, with 52 Republican senators, is likely to win.

Democrats are panicked at this prospect. When Gorsuch replaced Antonin Scalia, it was one conservative replacing another. It didn't change the 4-4 liberal-conservative balance on the nine-member court. Kennedy's voting record was centrist, and he often cast a decisive fifth vote. Kavanaugh is expected to be a dependable conservative vote. This will create a new conservative majority that might endure for a decade or more, thus the panic on the Left.

So what is their strategy? Delay any Senate hearings or vote on Trump's next Supreme Court appointment until after the November mid-term elections. As always, one-third of the Senate's 100 seats are up for election in

Democrats lose at their own game

November. If the Democrats could pick up just two or three seats, they could block Kavanaugh or any other Trump nominee. Thus the Democrats' new rallying cry: "Let the people decide."

For Democrats, this populist appeal is somewhere between ironic and laughable. For the past five decades, their party has been the party of judicial activism - of unelected, unaccountable judges overruling elected, accountable legislators. From court-ordered student busing to abortion to capital punishment to same-sex marriage to climate change - the various groups that constitute their progressive wing have stood for not "letting the people decide" these issues.

By contrast, the one common denominator of the various "conservative" judges that Trump is appointing is their commitment to the doctrine of "original understanding" or "textualism" when it comes to interpreting the Bill of Rights. In practice this means that judges are much less likely to overrule the policy choices of elected governments.

If, as the Democrats hope, this November's Senate elections were to become a referendum on Supreme Court appointments, the "let-the-people-decide" vote should clearly go the Republicans. But of course, this will not happen. Neither Trump nor the Republican majority in the Senate are going to postpone the confirmation hearings and vote. Why would they? They are just playing the same game that the Democrats have been playing since they blocked Ronald Reagan's 1987 appointment of Robert Bork - the conservative Yale law professor who was arguably the most qualified nominee in the past half century. Conservatives have not forgotten that it was Bork's defeat that led to the eventual appointment of a compromise candidate acceptable to Democrats: Anthony Kennedy. Revenge is a dish best served cold.

So get ready for a few more weeks of rhetorical fireworks and dire predictions of doom and gloom. Such theatrics may make the Democrats feel better, but it will do little to fix their longerterm problem: that they have become dependent on the least democratic institution in government to defend what they are no longer able to win in elections.

The progressive version of the "heroic judiciary" rescuing Americans from themselves is much loved in American law schools and urban media centres on the East and West coasts. But it has not gone down well in the 40-odd "fly-over" states in between, almost all of which voted for Trump. If the Democrats want to start appointing federal judges again, they had better start paying more attention to the voters in the middle.

National Post Ted Morton is a professor emeritus in political science and an executive in residence at the School of Public Policy at the University of Calgary. !@COPYRIGHT=© 2018 Postmedia Network Inc. All rights reserved.

Graphic

Chip Somodevilla, Getty Images; Senate Majority Leader Mitch McConnell, left, speaks with U.S. Supreme Court nominee Judge Brett Kavanaugh in Washington on Tuesday.;

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